In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1759

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MICHAEL RODAK, JR., CLERK

EVELYN RENE JOHNSON, a minor aged ten years, by MARLENE MILLER, *Petitioner*,

vs.

C. TAYLOR WHITTIER, individually and as Kansas Commissioner of Education, KANSAS STATE BOARD OF EDUCATION, JOHN W. FRAZIER, PAUL J. JONES, DOROTHY BALLARD, DOROTHY G. GROESBECK, HAROLD H. CRIST, THOMAS J. PITNER, WILLIAM T. BILLINGSLEY, HARRY O. LYTLE, JR., CARL M. WILSON and ERVIN E. GRANT, each individually and as members of Kansas State Board of Education, BOARD OF EDUCATION OF TOPEKA UNIFIED SCHOOL DISTRICT 501, MARK L. MORRIS, JR., ROBERT R. SCHENDEL, GORDON SOMMERS, FRED W. RAUSCH, JR., CONSTANCE L. MENNINGER, HARRY W. CRAIG, JR., R. G. SWENSON, WAYNE T. STRATTON and T. C. ANDERSON, et al., *Respondents*.

UNIFIED SCHOOL DISTRICT #501, AND ITS INDIVIDUAL MEMBERS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNIFIED SCHOOL DISTRICT #501, AND ITS INDIVIDUAL MEMBERS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

Respondent, Unified School District #501, and its individual members, prays that a Writ of Certiorari not issue in this matter and files its Brief in opposition to the Petition for Writ of Certiorari.

JURISDICTION

The Petitioner in this matter has attempted to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254 (1) by requesting that a writ of certiorari issue upon the petition.

QUESTIONS PRESENTED

Petitioner's Statement of the Question presented omits factors important to a proper appreciation of the case. The Question would be more completely put as follows:

Where a fifth grade student bring a class action on behalf of all black elementary and junior high school students now attending, or who have attended, schools withn a vaguely defined geographic portion of a school district over a period of 10 years, for actual and punitive damages and declaratory injunctive relief as the result of receiving allegedly inferior educations, is the denial of class certification an appealable order where the named Plaintiff is allowed to proceed with her individual claim for $20,000.00; where the Plaintiff introduced no evidence to suggest that her own $20,000.00 claim was not a viable one absent class certification?

STATEMENT OF THE CASE

Petitioners seek $100,000,000.00 actual and $100,000,000.00 punitive damages together with declaratory-injunctive relief on behalf of 10,000 present and former black elementary and junior high school students who have attended vaguely defined geographic areas of Unified School District #501 (USD 501). The District is approximately congruent with the city limits of the City of Topeka, Kansas. Plaintiff's individual claim is for $20,000.00.

This Brief in Opposition to the Petition for Writ of Certiorari is presented on behalf of USD 501 and its individual, popularly elected, non-salaried Board Members. Other defendants are the Kansas Commissioner of Education, the Kansas State Board of Education, and its individual members. The Secretary of the Department of Health, Education and Welfare was dismissed as a party.

The thrust of Petitioner's claim in the Complaint is that over a period of ten years each of the 10,000 members of her alleged class have received an inferior education, worth $10,000 less than the education received by black, white, and other children attending schools in other areas of the district, and each class member is entitled to $10,000 actual and $10,000 punitive damages. Petitioner also seeks declaratory relief and an injunction to change procedures of District Schools. The Petitioner makes no distinction as to children attending particular schools for differing number of years and no charge is made that white children in the schools Plaintiff complained of have experienced deprivation.

All defendants are alleged to be personally responsible without any distinction made or regard shown to when or how long the named individuals served in office.

Petitioner refers to *Brown* v. *Board of Education of Topeka,* 349 U.S. 294 (1954) as authority for the instant litigation. That case was remanded to the United States District Court for the District of Kansas for implementation of the decision. In accordance with Orders of this Court, the United States District Court for the District of Kansas, sitting as a three judge Court, in *Brown* v. *Board of Education of Topeka,* Civil Action T-136, required a plan of school district operation to be prepared. A plan was submitted and approved by that three-judge Court on Oc-

tober 28, 1955. See 39 F. Supp. 468. However, of significance to this action is the fact that jurisdiction of school district operations was retained by the Court and continues to this day. Thus, the school district operations complained of by the Petitioner have been under the retained jurisdiction of the District Court during the entirety of the ten year period in issue. Otherwise, this litigation has no connection with *Brown*.

It should also be noted by this Court that after the Petitioner's Motion for Determination of a Class Action was filed, a lengthy hearing was held at which Petitioner presented extensive citations of authority and argument and was afforded the opportunity to put on evidence in support of a class action. The Petitioner was additionally afforded the opportunity to put on evidence to suggest her individual $20,000 claim was not viable absent class certification. However, the Petitioner presented no such evidence.

The District Court for the District of Kansas denied class action certification but did certify its Order of Denial for Review by the Tenth Circuit Court of Appeals under 28 U.S.C. §1292(b). The Plaintiff improvidently attempted an appeal of right under 28 U.S.C. §1291.

The Court of Appeals for the Tenth Circuit declined the discretionary appeal, and sustained this Respondent's Motion to Dismiss the Appeal under 28 U.S.C. §1291 for the reason that the denial of class certification did not constitute a final, appealable order. (Petition, App. "B")

The Respondent herewith submits the correctness of that ruling by the Tenth Circuit Court of Appeals and also offers herewith its arguments and reasons why the Writ of Certiorari should not issue.

ARGUMENT AND AUTHORITIES IN SUPPORT OF DENIAL OF THE WRIT OF CERTIORARI

The wisdom of the District Court denying class action certification should not be a point of concern in the appeal. The only question for determination is whether that order, for whatever reason, may be tested at this stage of the litigation.

That is to say, under 28 U.S.C. §1291 an appeal lies only from a final order. This Court has always chosen to test the "finality" of an order by practical rather than technical construction. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Consequently, can this litigant, now, at this stage of the proceedings, appeal the order denying class certification under U.S.C. §1291?

As a general rule, orders denying class status are regarded as interlocutory and not ordinarily reviewable until the entry of final judgment. *Monarch Asphalt Sales* v. *Wilshire Oil Co.*, 511 F.2d 1073 (10th Cir. 1975). Petitioner in this matter urges this Court to allow denials of class action certification to be appealable as a matter of right or, in the alternative, to allow a virtually unlimited application of the "death knell" doctrine as an exception to the general rule. Neither request should be sustained.

To allow a petitioner the unlimited right to appeal the denial of class action certification as a matter of right would be tantamount to a repeal of the final judgment rule embodied in U.S.C. §1291. At the very least, such a ruling would run directly contrary to the final judgment rule embodied in 28 U.S.C. §1291 and the sound reasons upon which it is predicated. The final judgment rule also has jurisprudential significance far beyond mere technicalities

and should be viewed and applied as an authoritative application and implementation of the basic and persisting policy against piecemeal appeals. The purpose of this section (U.S.C. §1291) is to combine in one review all stages of the proceedings that effectively may be reviewed and corrected if and when final judgment results.

The rules presently extant governing the appealability of class action orders are no different—and should be no different than those applicable to civil actions generally. To be appealable, an order must be either a final judgment or within one of the exceptions to the final judgment rule. This rule limits appellate jurisdiction to final decisions of the district courts and is intended to conserve judicial resources by preventing piecemeal review of interlocutory rulings which arise during the course of a lawsuit. See *Cobbledick* v. *United States*, 309 U.S. 323, 324-25 (1940); and *Catlin* v. *United States*, 324 U.S. 229, 233-34 (1945). Such appeals would generate constant interruptions of trials and delays in terminating a case, and increase the potential for harassment of one party by another. See *American Express Warehousing Ltd.* v. *Transamerica Ins. Co.*, 380 F.2d 277, 280 (2d Cir. 1967). Tentative, incomplete or informal decisions should not be immediately reviewed since such decisions are subject to change and subsequent action by the trial court might render appellate review futile or moot. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

Traditionally, this Court has viewed a final decision as one which ends the litigation on the merits and leaves nothing for the Court to do but execute on the judgment. See *Catlin* v. *United States, supra; St. Louis & Southern Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24 (1883); and *Bostwick* v. *Binkerhoff*, 106 U.S. 3 (1882).

The Respondents would submit that the Petitioner does not have a "final order" for this Court to review. Appellate consideration of this order must be deferred until the whole cause is litigated and this Petitioner's request should be denied.

A limited exception to the final judgment rule was recognized in *Eisen* v. *Carlisle & Jacquelin* (*Eisen I*), 417 U.S. 156 (1973). Following *Cohen*, the Court recognized that a denial of certification provides finality from a practical standpoint where Plaintiff was left with only his individual $70.00 claim. The Court thus concluded that "where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed." *Eisen, supra;* at page 162.

Consequently, all this Court must do is to ask the question of whether, as a matter of law, *with no record evidence furnished by Plaintiff,* who still has an individual claim of $20,000; can the Plaintiff invoke this exception? We would submit that no such determination is warranted.

Plaintiff's Petition urges as reasons why a writ should issue, various arguments to the effect that error was allegedly committed by the District Court in denying class certification. Her authorities are basically those involved with the merits of certification and not the appealability of a class certification determination. See e.g., *Esplin* v. *Hirsch*, 402 F.2d 94 (10th Cir. 1968), cert. den., 394 U.S. 928 (1960) (Pet. p. 5), which had nothing to do with the pre-judgment appealability of a class certification denial. See also *Halverson* v. *Convenient Mart, Inc.*, 458 F.2d 927 (7th Cir. 1972), where the case was dismissed because of what the District Court believed was solicitation by Plaintiff's counsel.

The question is not whether the order was correct, but whether it is appealable.

Cohen, supra, and *Eisen, supra,* stand for the proposition that if, because of practicalities, a litigant will never have a chance to test error absent immediate appeal, the class question is appealable before final judgment. Otherwise, it is not. This Court can hardly arbitrarily fix, for all cases, a dollar value on "appealability" in class actions. *But,* we submit that if a $20,000 individual claim, as is present in this case, is not at least presumptively viable on its face, absent clear proof to the contrary, virtually all class determinations will be automatically appealable.

Since the Petition argues the merits of certification denial and not its appealability, there is no useful purpose to be served in extended commentary on Plaintiff's authorities. However, one case cited by Plaintiff is worthy of comment. Plaintiff cites *Gosa* v. *Securities Investment Company,* 449 F.2d 1330 (5th Cir. 1971) (Pet. pp. 6, 7) as a source of factors to be considered in determining the tolling of the "death knell." That case involved denial of class certification and dismissal of an appeal for lack of jurisdiction, as in the instant case.

The Fifth Circuit Court pointed out on page 1332 of 449 F.2d that:

> "We would have to engage in rank speculation if we were to undertake the determination of such matters as: . . . [anticipated expenses, solvency of the named party and other financial considerations.]
>
> * * *
>
> If the plaintiff wished to assert that what was otherwise a purely interlocutory ruling was efficiently converted by the practical circumstances of the matter to

> an extinction of the very right to litigate, the plaintiff had the burden of developing these facts before the trial forum, which could afford an opportunity for adversary rebuttal and could enter findings and conclusions on this issue. Such a post-ruling hearing elimiates the procedural deficiency of requiring this Court to speculate without the benefit of relevant record facts or a decision on the real issues presented."
>
> * * *
>
> (fn. 2, p. 1333—"However, the Record indicates no attempt at this hearing by appellant to present evidence other than conclusory assertions to the inability of his client to proceed individually.")

As in the instant case, the *Gosa* plaintiff introduced no record evidence of practical finality, and merely argued vaguely with the apparent hope that rhetoric might supply what the transcript lacked.

Further, the respondents would suggest to this Court the case of *Ott* v. *Speedwriting Publishing Company,* 518 F.2d 1143 (6th Cir. 1975). In that case class action status was denied by the United States District Court and the Plaintiffs appealed to the Sixth Circuit Court of Appeals. That Court, following the reasoning of the Fifth Circuit Court in *Gosa,* stated as follows in language directly applicable to the instant case on page 1149 of 518 F.2d:

> "We conclude that although the reference to death knell originated in *Eisen I,* it is but one concrete application of an exception to the rule of finality which has been recognized by the Supreme Court at least since its decision in *Cobbledick* v. *United States, supra.* In *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964), the Supreme Court approved the action of this court in deciding a case on

appeal from an order striking portions of a complaint. It noted that previous departures from the requirement of finality had been approved in cases where a ruling was 'fundamental to the further conduct of the case.' *Id.* at 153, 85 S.Ct. at 311. The Court referred to the necessity recognized in *Dickinson* v. *Petroleum Conversion Corp., supra,* to balance the competing considerations of 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' 338 U.S. at 511, 70 S.Ct. at 324 (footnote omitted). We hold that the death knell doctrine is a legitimate expression of a well supported exception to the requirement of finality. Its application must depend, however, upon a balancing of the competing considerations described by the Supreme Court. *Such a balancing can only be based on the record before the appellate court. Thus, we adopt the rule of the Fifth Circuit that no order denying class action certification may be appealed to this court unless the appealing party develops a factual record in the district court from which the District Judge may make findings on the issue of whether, for all practical purposes, the order from which the appeal is sought actually extinguishes the litigation. Gosa* v. *Securities Investment Co., supra.* The district court may dispense with this requirement in cases where it takes judicial notice that the amount involved is so small that it is obviously unfeasible for an individual plaintiff to continue the litigation without class action status. . . . In the interest of judicial economy, however, and noting that the plaintiff's total damages of $30 make this a case where further individual litigation may be presumed to be impracticable, we will proceed to decide the appeal which has been briefed

and argued before us rather than remanding for findings by the district court. *Gillespie* v. *United States Steel Corp., supra* . . ."

In this instant case now before this Court, the Plaintiff was given the opportunity to present evidence and to make an evidentiary record, but she failed to do so. Consequently, there can be no balancing of the "competing considerations" unless there is a factual record upon which this Court can rely. The Plaintiff has not supplied the Court with that record.

However, we would urge on this Court that it can take judicial notice of the fact that the Plaintiff does have her own $20,000 claim (double the jurisdictional limit) still pending. That claim, in and of itself, should be sufficient to negative any indication that the "death knell" has sounded—even in the absence of an evidentiary record. The instant case is easily distinguished from the situations in *Eisen, supra,* and *Ott, supra,* wherein there were remaining claims for $70 and $30 respectively.

In two cases consolidated under the title of *Korn* v. *Franchard Corp.,* 433 F.2d 1301 (2d Cir. 1971) the Court decided that Mrs. Korn's suit for violations of the federal securities law "will go no further without class suit designation." (433 F.2d at 1306) Because Mrs. Korn's loss amounted to $386, the Second Circuit denied a motion to dismiss an appeal denying a class action certification. *However,* in the companion case the actual claims of the representative were for about $8,500. The Court concluded:

> ". . . That figure is close enough to the federal jurisdictional minimum for certain types of cases to suggest it is sufficient incentive to keep the case alive." (433 F.2d at 1306-07)

Accordingly, the "death knell" doctrine was not appropriate in that case—and it is not appropriate in this case.

Further, the Plaintiff vaguely argues (Pet. pp. 5 and 6) that her costs will be "great," and ". . . there can be no doubt that the expenses involved in prosecuting this litigation require class action certification . . ." (Pet. p. 7) However, that is only argument, and it should be noted it is highly inconsistent with her prior assurances to the District Court that she could represent the class. Certainly the costs should be less for her individual claim. The Respondent fails to see the logic in her assertions that she can effectively represent 10,000 people, to all of whom she must give notice, but she cannot economically pursue her own $20,000 claim.

Plaintiff urges this Court to adopt the reasoning and rationale of *Bell* v. *Beneficial Consumer Discount Company*, 348 A.2d 734 (1975), to the effect that under Pennsylvania state practice all class determinations are appealable. The *Bell* Court recognized differences between the state and federal rules, but the Plaintiff was careful not to explore them.

In urging the adoption of the *Bell* rationale, Plaintiff does not show to the Court that if *Bell* is adopted, continued revision of class determinations during the course of litigation allowed by Rule 23 of the Federal Rules of Civil Procedure, would presumably make all those orders appealable of right. That is what the logic of *Bell* calls for and what litigants will keenly grasp if such a decision is made.

The absolute rule adopted by the Pennsylvania Court is fraught with difficulty. If this Court adopts that rule, the result could very well be that *all* preliminary orders

or decisions respecting class certification (whether for or against class certification, establishing notice requirements, modifying the class, designating sub-classes, etc.), will be subject to full appellate review at any stage of the litigation. Thus, a decision made on the eve of trial to constrict the class and establish sub-classes or expand notice would be immediately reviewable.

Plaintiff suggests to this Court what other writers have suggested. See Note, *Interlocutory Appeals from Orders Striking Class Action Allegations*, 70 Colum. L.Rev. 1292 (1970); and *Class Action Certification Orders: An Argument for the Defendants' Right to Appeal*, 42 George Washington L.Rev. 621. However, they do not sit on Federal Appellate tribunals.

If *Bell, supra,* is embraced by this Court, litigants will quickly assert that many other heretofore interlocutory orders are just as important as an order controlling the progress of a class action and should be appealable also. The *Bell, supra,* approach is commendable only for its simplicity. The *Cohen, supra,* and *Eisen, supra,* reasoning goes a lot further toward weighing all aspects of the appellate process and gives meaning to the finality requirements imposed by Congress in 28 U.S.C. §1291; while at the same time recognizing that, *upon a proper record showing and consideration of practicalities,* some certification denials may be final and appealable.

The *Cohen, supra,* and *Eisen, supra,* cases make us resort to reason, while *Bell, supra,* represents a denial of finality requirements.

Plaintiff (Pet. p. 9) states the writ should be allowed because the Tenth Circuit decision (App. "B") conflicts with the Second and Sixth Circuits and the Tenth Circuit has, in the instant case, decided a question not yet settled by this Court. We are not favored with a statement of

what the conflict between the Circuits is or what cases evidence that conflict. Neither are we favored with an explanation of what the Tenth Circuit has decided that this Court should review. We know that the Second, Sixth and Tenth Circuits are all bound to follow *Eisen, supra,* and the Tenth Circuit did so in this case. (Pet. App. "B" p. 2) See *Caceres* v. *International Air Transport Assoc.,* 422 F.2d 141 (2d Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969); *Shayne* v. *Madison Square Garden Corp.,* 491 F.2d 397 (2d Cir. 1974); *Mulberg* v. *Western Pacific Railroad,* 443 F.2d 1301 (2d Cir. 1971); *Green* v. *Wolf Corp.,* 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977; *Walsh* v. *City of Detroit,* 412 F.2d 226 (6th Cir. 1969); *Ott* v. *Speedwriting Publishing Co. supra* (6th Cir. 1975); *Monarch Asphalt Sales* v. *Wilshire Oil Co.,* 511 F.2d 1073 (10th Cir. 1975); and *Ringsby Truck Lines* v. *United States,* 490 F.2d 620 (10th Cir. 1973).

The Tenth Circuit Court was bound to follow *Eisen, supra,* not *Bell, supra. Eisen, supra,* holds that the order is not final and is not appealable unless the "death knell" exception applied. The Tenth Circuit Court notes in their opinion that:

> "Appellant vaguely suggests that we should apply the 'death knell' exception in this case to obviate the final order requirement of §1291. However, appellant completely fails to show with any degree of specificity how the order appealed from will in any way impair the viability of her individual claim or her ability to pursue it.
>
> * * *
>
> At this point in the litigation, it appears that plaintiff's individual claim for money damages in the amount of $20,000 remains viable and will be unaffected by the absence of the proposed class." (Pet. App. "B", p. 2)

Plaintiff made no attempt to present the District Court any evidence that her individual claim was not viable. The Tenth Circuit Court, accordingly, had no possible basis for rendering a decision other than the one it did. This Court, likewise, has no record upon which to find any conceivable impairment of Plaintiff's individual claim and indeed has a contrary indication with her pending $20,000 claim. Without some record evidence of impairment, the "death knell" should not become an issue.

Plaintiff's Petition fails to come to grips with the issue before this Court and erroneously assumes that the correct approach is to urge reversal of the District Court for some alleged error. She is here only for the very limited purpose of urging this Court to decide whether the District Court could be reviewed at all, at this stage of the litigation. Her Petition, however, is almost entirely devoted to the reasons for her dissatisfaction with the District Court order and order of the Tenth Circuit Court. Her efforts would be better directed toward the rule enunciated in *Eisen, supra.* There is no showing of "practical" finality and the writ should not be allowed.

CONCLUSION

Rule 19(1)(b) of this Court clearly sets forth the criteria governing the grant of a Writ of Certiorari. Clearly, the Tenth Circuit Court has not "rendered a decision in conflict with the decision of another Court of Appeals on the same matter." More to the point, the Tenth Circuit Court faithfully adhered to the mandate of this Court in *Eisen, supra.* Plaintiff made no showing that her $20,000 individual claim was not viable and it is inconceivable that such a showing could be made.

The posture of the instant case on appeal precisely parallels that of *Gosa, supra,* and *Ott, supra.* Since Petitioner did not introduce evidence below to show for all practical purposes the order from which the appeal is sought actually extinguishes the litigation, there would be nothing on which this Court could base its "necessarily *ad hoc* determination." An individual claim may be so small that the unfeasibility of litigation by the individual plaintiff is clear without any further showing. *However,* the claim in this case is relatively large (twice the jurisdictional limit). In *Gosa, supra,* a claim for $3,322.20 was not so small as to call for the application of the death knell exception without any further showing; *a fortiori* the Petitioner's claim here of $20,000, standing alone, is not small enough to show the unfeasibility for this individual Plaintiff of litigating her claim to the final adjudication in the District Court.

Congress has determined in its wisdom, and we think it is indeed wise, that some orders merely regulating the process of litigation can be better left to the unreviewable discretion of the District Court rather than become the subject of appeal—and we think this is just such a case.

Finally, the Petitioner has not suggested to this Court any persuasive authority or compelling reasons why it should at the present time rethink its position or reconsider the precedents and augment the rising number of appeals. The unprecedented number of appeals can only detract from the speedy resolution of admittedly appealable cases and questions. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law,* 82 Harv. L.Rev. 542 (1969).

We do not believe that either jurisdictional ground suggested by Petitioner in the Petition has been sub-

stantiated by Petitioner and at the present time the Court should allow this case to take its normal course in the District Court. No useful purpose could be served by allowing the writ and it should be denied.

WHEREFORE, the Respondent respectfully requests this Court to enter an order denying the Writ of Certiorari.

Respectfully submitted,

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